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In the Supreme Court

of the United States

OCTOBER TERM

No. 1000

PACIFIC INLAND NAVIGATION COMPANY,
a corporation,

Petitioner,

v.

DELBERT A. COURSE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions of the Courts Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	2
Statement of the Case	2
Reasons for Granting the Writ	3
1. The decision of the Court below destroys the immunity of an employer to an employee provided by Congress in Title 33 U.S.C. Sec. 905	3
2. The decision of the Court below decided a Federal question which has not been, but should be, decided by this Court	6
a. Libel in rem	7
b. Respondent not a longshoreman	10
3. The decision of the Court below conflicts with prior holdings of this Court	12
4. Importance of the Question	12
Conclusion	14
Appendix A—33 U.S.C. Sections 905, 933 (a)	15
Appendix B—Opinion of Court of Appeals	16

CITATIONS

Page

CASES

Amell v. United States, 384 U.S. 158 (1966) 13

Bennett v. The MORMACTEAL, 358 U.S. 817, 254 F.2d 138 (2 C.A. 1958) 12

Grillea v. U. S. and National Shipping Authority, 232 F.2d 919 (2 C.A. 1956) 8

Johansen v. United States, 343 U.S. 427 (1952) 13

Nogueira v. N.Y.N.H. and H.R. Co., 281 U.S. 128 (1930) 12

Patterson v. United States, 359 U.S. 495 (1959) 13

Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334 (1953) 12

Reed v. S. S. YAKA, 373 U.S. 410 (1963) 2, 3, 5, 6, 7, 8, 10, 13

Ryan Stevedoring Company v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) 4, 7, 12

Smith v. MORMACDALE, 198 F.2d 849 (3 C.A. 1952) 7

Spinelli v. Isthmian S.S. Co., 326 F.2d 870 (2 C.A. 1964), Cert. Den. 377 U.S. 935 10

Swanson v. Marra Bros., 328 U.S. 1 (1946) 12

United States v. Demko, — U.S. —, 17 L. Ed. 2d 258 (1966) 5

Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963) 7, 13

CITATIONS (Cont.)

Page

STATUTES

18 U.S.C. Sec. 4126 5
28 U.S.C. Sec. 1254 (1) 2
5 U.S.C. Sec. 757 (b) 12
33 U.S.C. Sec. 901 3
33 U.S.C. Sec. 903, 3a (1) 13
33 U.S.C. Sec. 905 ..... 2, 3
33 U.S.C. Sec. 933 2
33 U.S.C. Sec. 933 (a) 4, 7
33 U.S.C. Sec. 933 (i) 6

MISCELLANEOUS

U. S. Congressional and Administrative News, 1959, Volume 2, p. 2134, Senate Report 428 ... 4, 5

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No._____

PACIFIC INLAND NAVIGATION COMPANY,
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v.

DELBERT A. COURSE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 26, 1966.

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the District of Oregon is unreported. It appears at pages 61-63, Volume I, Transcript of Record. The

opinion of the Court of Appeals is not reported but it appears at page 105 of Volume I, Transcript of Record and is printed in Appendix B, infra, pp. 16-18.

JURISDICTION

This Petition for Writ of Certiorari is filed less than ninety days after entry of judgment by the Court of Appeals.

The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Title 33 U.S.C. Secs. 905 and 933; Longshoremen's and Harbor Workers' Compensation Act (Appendix A, infra, p. 15).

QUESTION PRESENTED

Does the case of *Reed* v. *SS YAKA*, 373 U.S. 410 (1963) authorize an *in personam* action by a ship repairman against his tugboat owner-employer, in face of the plain language of Title 33 U.S.C. Sec. 905, prohibiting such suits.

STATEMENT OF THE CASE

This action involves a libel *in personam* for damages for unseaworthiness of the tug "BANNOCK" and negligence of the tug owner instituted by a ship repairman-marine electrician, Delbert A. Course, re-

spondent, against his tugboat owner-employer, Pacific Inland Navigation Company, petitioner. The claim results from an injury sustained aboard the tug "BANNOCK" while lying in navigable waters of the United States at petitioner's tugboat repair yard at Vancouver, Washington, on December 19, 1963.

The tug "BANNOCK" was wholly owned and operated by petitioner. Respondent had been in petitioner's employ for more than one year prior to his injury (page 7 of Volume II, Transcript of Record) and worked only upon vessels belonging to petitioner (page 86, Volume II, Trancript of Record).

Respondent received from petitioner the statutory benefits of the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C. Secs. 901, et seq.

The District Court allowed the respondent to maintain the action under the assumed authority of *Reed* v. *SS YAKA*, supra.

The Court of Appeals affirmed on the ground that *Reed* v. *SS YAKA*, supra, read Sec. 905 out of the Longshoremen's and Harbor Workers' Compensation Act as applied to the case at bar.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below destroys the immunity of an employer to an employee provided by Congress in Title 33 U.S.C. Sec. 905.

By enacting the Longshoremen's and Harbor Workers' Compensation Act, supra, Congress created

a comprehensive system for compensating longshoremen and harbor workers for injuries arising out of their employment. As a *quid pro quo* to support the imposition of liability without fault, Congress specifically made the liability of an employer to an employee "exclusive and in place of all other liabilities—at law or in admiralty."[1] Congress reserved to these workmen the right to seek damages from third persons causing injury, but in Sec. 933 (a) made it crystal clear that they could not seek such damages from their employers (Appendix A, infra, p. 15).

In *Ryan Stevedoring Company* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) this Court recognized that Sec. 905 limited an employer's liability to an employee, but held that Sec. 905 did not prevent the damages recovered by an employee from a third person from being visited upon the employer where the employer had, by a contractual agreement, agreed to assume the greater liabilities of the third party shipowner. However, this Court made it clear that the liability imposed upon the employer did not arise from any duty owing to its employee, because of the employment relationship. 350 U.S. at pp. 131, 132.

Three years after *Ryan*, a committee of Congress, while considering amendments to extend the employers immunity to the injured workmen's fellow-servants, reaffirmed the exclusiveness of the employer's liability in Senate Report 428, U. S. Congressional and Administrative News, 1959, Vol. 2, page 2134, saying:

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[1] Title 33 U.S.C. Sec. 905.

> "Sec. 5 (905) of the Longshoremen's and Harbor Workers' Compensation Act, makes the statutory liability of an employer the exclusive liability for injury to an employee *arising out of the employment.* This section also reserves to the employee the right to recover against third parties causing injury." (emphasis supplied)

In spite of this clear Congressional mandate and of this Court's construction of Sec. 905, the Court below held that *Reed* v. *SS YAKA*, supra, read Sec. 905 out of the Act to allow a ship repairman to maintain a direct action against his employer-tugboat owner.

That this Court's holding in *Reed* v. *YAKA*, supra, contemplated no such result, is clearly demonstrated by this Court's recent holding in *United States* v. *Demko*, — U.S. —, 17 L. Ed. 2d 258 (1966) limiting Demko to compensation provided in Title 18 U.S.C. Sec. 4126 to the exclusion of the Federal Tort Claims Act, saying:

> "In *Johansen* v. *United States*, supra, at 440-441, this Court stated 'where the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.' Later in *Patterson* v. *United States*, supra, at 496, this Court emphatically refused to abandon the Johansen ruling calling attention to the fact that Congress by specific statute could change the Johansen policy at any time."

As pointed out above in Senate Report 428, supra, Congress has not made legislative changes in Sec. 905.

On the contrary, Congress reaffirmed the immunity of the employer and by enacting Sec. 933 (i) extended it to all within the employee family.

2. The decision of the Court below decided a Federal question which has not been, but should be, decided by this Court.

Reed v. *SS YAKA*, supra, did not decide that an employer was liable to his employee-ship-repairman, because the employer owned the tugboat upon which the repairman was injured.

In *Reed* v. *SS YAKA*, supra, a longshoreman, Reed, was allowed to recover through a libel *in rem* against a vessel owned by a third party, Waterman Steamship Co., which had been bareboat chartered to Pan-Atlantic S.S. Corp., which was also Reed's employer. The charter contained a complete hold harmless agreement running from Pan-Atlantic to Waterman. Reed, injured by a defective pallet board supplied by Pan-Atlantic, filed a libel *in rem* against the SS YAKA. Waterman appeared as owner and claimant, and pursuant to the hold harmless agreement, impleaded Pan-Atlantic for indemnity. The District Court[2] held that Reed could recover on his libel *in rem* against the SS YAKA and that Waterman, pursuant to the indemnity agreement, was entitled to be made whole by Pan-Atlantic.

The Third Circuit[3] held that its prior decision in

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[2] *Reed* v. *S.S. YAKA*, 183 F. Supp. 69 (E.D. Pa. 1960).

[3] *Reed* v. *S.S. YAKA*, 302 F.2d 255 (3 C.A. 1962).

Smith v. *The MORMACDALE*, 198 F.2d 849, (3 C.A. 1952) prevented maintenance of the action.

This Court reversed the Third Circuit thus returning the case to its former posture in the District Court. This is the same tri-partite posture sanctioned by Title 33 U.S.C. Sec. 933 (a).

This Court in *Reed* v. *SS YAKA*, supra, while stating that Pan-Atlantic's liability to Reed arose out of its status as a bareboat charterer of a vessel, was concerned with the contractual agreement, whereby the charterer, Pan-Atlantic, had expressly agreed to indemnify the third party shipowner for any claims made against the vessel. Thus, Pan-Atlantic's liability to Reed arose solely from the hold-harmless agreement running to the shipowner, and not because Pan-Atlantic was the owner *pro hac vice*.

This is the same theory upon which liability was imposed by this Court upon the employers in *Ryan Stevedoring Company* v. *Pan-Atlantic S.S. Corp.*, supra, and in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963).

Assuming that this Court is of the opinion that *Reed* v. *SS YAKA*, supra, is not based upon the contractual assumption of liability, it is respectfully submitted that the case at bar is still not settled by that case.

a. *Libel in rem*

This case proceeds not by way of a libel *in rem* but instead as a complaint at law wherein respondent

contended in the Pretrial Order, that he was entitled to recover from petitioner for the unseaworthiness of its vessel and the negligence of his fellow employees (Pages 53-58, Volume I, Transcript of Record).

Respondent made the same contention on appeal to the Court of Appeals. (Appendix B, infra, pp. 16-17).

Reed v. *SS YAKA*, supra, held only that an employer of a longshoreman, who is also a ship charterer, may be charged with responsibility for unseaworthiness of the ship, which obligation will support a libel *in rem* 373 U.S. at 416. Indeed, this holding was anticipated by Judge Learned Hand in the oft-cited *Grillea* case. *Grillea* v. *U. S. and National Shipping Authority*, 232 F.2d 919 (2 C.A. 1956). Judge Hand held initially[4] that there was no personal liability of the United States to an injured longshoreman when the United States had bareboated its vessel to Moore-McCormack Lines because the unseaworthiness found arose after the charter. On the petition for rehearing,[5] Judge Hand treated the libel as a libel *in rem* and allowed recovery from the vessel, holding that the contract by which the demisee operated the vessel made the demisee personally liable for the condition of the vessel and hence supported the libel *in rem*.[6]

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[4] *Grillea* v. *U. S. and National Shipping Authority*, 229 F.2d 687 (2 C.A. 1956).

[5] *Grillea* v. *U. S. and National Shipping Authority*, 232 F.2d 919 (2 C.A. 1956).

[6] "That does not indeed answer the question whether a maritime lien can be imposed upon a ship for a claim on which no jural person is liable 'in personam.' Moreover, although in the case at bar the demisee was liable under the

The vessel itself is the offending instrument whose condition determines liability so long as a jural person has agreed to be responsible for the vessel's condition and thus support the libel. The liability is, however, determined by the dangerous condition of the *res* and not by reference to the negligence of the employees of the jural person. It is for this reason that the action must proceed as an action *in rem* rather than as an action *in personam*. If the latter were allowed, a longshoreman would be permitted to recover from a shipowner for the negligence of his fellow longshoreman if the shipowner acted as a stevedore. In that instance, his fellow longshoreman would be employees of the shipowner and under principles of *respondeat superior* their negligence would be imputed to the shipowner. Indeed, this is what the respondent

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Longshoremen's and Harbor Workers' Act, Sec. 901 et seq., Title 33 U.S.C., the liability was only for compensation—a claim different from that in suit, both in kind and amount. So far as we have found, this is a question that has never come up in the books, although, as *res integra*, we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'. That would amount to saying that there should be no limited liability without fault, although unlimited liability without fault is not infrequently imposed. Be that as it may, a demisee who is under only a limited liability to his employee may make himself liable to the demisor for full recovery in case the demisor is so liable to the employee. That will be true if the demisee has broken a contract with the demisor and the injuries to the employee measure the damages for the breach. In the case at bar, the demisee had made such a contract, for the charter (Clause 27) contained the following promise: 'the charterer shall indemnify the owner against any lien * * * arising out of the operation of the Vessels by the Charterer.' Therefore, even though one thought it unjust as between the two that the demisor should be liable for full damages when the demisee was not, this clause is an answer." 232 F.2d 923, 924.

attempted to do in the case at bar when he claimed that he was entitled to recover for negligence.

The incongruous result of which this Court complained in *Reed* v. *SS YAKA*[7] would thus be created if an action *in personam* is allowed. A longshoreman employed on a vessel operated by his employer could recover for the negligence of his fellow employees, while a longshoreman employed on a vessel operated by a third party could not recover for the negligence of his fellow employees unless such negligence created an unseaworthy condition. *Spinelli* v. *Isthmian S.S. Co.*, 326 F.2d 870, (2 C.A. 1964), Cert. denied 377 U.S. 935.

It is protection for unseaworthiness which is sought in *Reed* v. *SS YAKA*, supra, and such protection is fully secured through a libel *in rem*. Allowance of an action *in personam* opens the door to additional liability neither provided for nor consistent with *Reed* v. *SS YAKA*, supra.

b. *Respondent not a longshoreman*

If the case of *Reed* v. *SS YAKA*, supra, can be construed to permit a longshoreman to rely upon his employer-vesselowner's dual personality to sustain a cause of suit against his employer, petitioner submits

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[7] "We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service." 373 U.S. 415.

that the rationale employed by this Court in allowing a longshoreman to do so is not applicable to a tugboat repairman.

Longshoremen receive their job opportunities through the offices of a central hiring hall rather than from face-to-face meetings with their prospective employers. Longshoremen are dispatched to their jobs without regard to whom their employers will be or on what vessels they shall work. Sometimes their employer is an independent stevedoring contractor and at other times it is a shipowner.

Noting the transient nature of the longshoremen's employment, this Court expressed a desire to afford them equal remedies whether they were employed aboard a vessel by an independent stevedoring company or by a shipowner.

Respondent, on the other hand, was steadily employed by petitioner. He was employed in petitioner's tugboat repair yard for more than one year prior to his injury (page 7, Volume II, Transcript of Record). Moreover, when he worked on vessels, he worked only upon tugboats solely owned and operated by petitioner (page 86, Volume II, Transcript of Record).

The rationale of this Court was to make a longshoreman's remedy for damages available whether he was employed by an independent stevedoring contractor or directly by a shipowner. To apply this rationale to the case at bar would result in giving respondent a remedy for damages which, because of the lack of a third party, he never enjoyed.

3. The Decision of the Court below conflicts with prior holdings of this Court.

This Court has consistently construed Sec. 905 as preventing an employee from maintaining a cause of action for damages against his employer. It has been so held whether the cause of action is granted to the employee by an Act of Congress or one traditionally recognized by the *admiralty common-law*. *Nogueira* v. *N. Y. N. H. and H. R. Co.*, 281 U.S. 128 (1930) and *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U.S. 334 (1953), *Federal Employees' Liability Act; Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946), *Jones Act; Ryan Stevedoring Company* v. *Pan-Atlantic S.S. Corp.*, supra, *admiralty common-law*.

In 1958 by refusing to accept certiorari in *Bennett* v. *The MORMACTEAL*, 358 U.S. 817, 254 F.2d 138 (2 C.A. 1958) this Court, at least impliedly, held that Sec. 905 prevented an employee from recovering through a libel *in rem* against a vessel which was owned by his employer, thereby preventing an employee from doing indirectly what he could not do directly.

4. Importance of the Question.

The United States Government, in operation of its rapidly growing marine service, has protected its employees under a Congressional Act known as the Federal Employees' Compensation Act, 5 U.S.C. Sec. 757 (b). This Act differs from the Longshoremen's and Harbor Workers' Compensation Act, supra, in

that the latter excludes, by explicit terms, members of the crew of any vessel, Sec. 903, 3a (1), while the former applies to all Federal civilian employees, crew members and shore-based workers alike, who are strictly limited to compensation benefits to the exclusion of the Public Vessels Act and Suits in Admiralty Act. *Amell* v. *United States*, 384 U.S. 158 (1966); *Johansen* v. *United States*, 343 U.S. 427 (1952); and *Patterson* v. *United States*, 359 U.S. 495 (1959).

The exclusive remedy provisions of each act, however, are almost identical, and in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 602 (1963) this Court held that they are to be construed the same.

If *Reed* v. *SS YAKA*, supra, is to be construed as holding that employee injuries caused by an unseaworthy condition must be deemed excepted from the exclusive remedy provision in Sec. 905, then as *Weyerhaeuser S.S. Co.* v. *United States*, *supra*, teaches, employee injuries must be similarly excepted from the exclusive remedy provisions of the Federal Employees' Compensation Act. Thus the holding of the Court below would render the Government amenable to direct actions by its maritime employees.

Others vitally affected by the decision of the Court below are petitioner's thirteen fellow members of the Columbia River Towboat Association, all of whom have traditionally repaired their own tugboats. Each operator employs tugboat repairmen who, like Delbert Course, are permanent employees.

While petitioner can only speak for itself and

other local tugboat operators, one can imagine that tugboat operators on both coasts, the Great Lakes, and all inland waterways are similarly affected.

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

33 U.S.C. Section 905:

"EXCLUSIVENESS OF LIABILITY. Sec. 905. The liability of an employer prescribed in Sec. 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Chapter, or to maintain an action at law, or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

33 U.S.C. Section 933 (a)

"If on account of a disability or death for which compensation is payable under this Chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PACIFIC INLAND NAVIGATION COMPANY, a corporation,	*Appellant,*	
vs.		No. 21,080
DELBERT A. COURSE,	*Appellee.*	

[October 26, 1966]

On Appeal from the United States District Court for the District of Oregon

Before: MERRILL and KOELSCH, Circuit Judges, and MATHES, District Judge

MERRILL, Circuit Judge:

This appeal presents the question whether a shipowner which operates its own repair yard can be held liable to its employee harbor worker for shipboard injury resulting from unseaworthiness of the vessel.[1]

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[1] This was a libel in personam, grounded on the admiralty jurisdiction of the District Court. 28 U.S.C. §1333(1) (1964).

Libelant first brought an action at law, alleging both unseaworthiness and negligence, grounded upon diversity jurisdiction. Upon Pacific's motion the negligence (Jones Act) claim was dismissed; later the unseaworthiness claim was transferred to admiralty by stipulation. Libelant has cross-appealed the dismissal of his negligence count, on the ground that even if a Jones Act claim will not lie, he can maintain a negligence action on the admiralty side under traditional maritime law, see *Pope & Talbot* v. *Hawn*, 346 U.S. 406, 413

The worker was covered by the Longshoremen's and Harbor Workers' Compensation Act,[2] and appellant contends that §905 of that Act precludes recovery.[3] The District Court held otherwise, relying on *Reed* v. *The Yaka*, 373 U.S. 410 (1962).

Appellant seeks to distinguish that case, asserting that there the employer, holding a bareboat charter from the shipowner, was obligated under the charter agreement to make the owner whole for damages resulting from an unseaworthy condition caused by the charterer. Appellant thus likens that case to *Ryan Stevedoring Company* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In *Ryan* the imposition on the employer of the economic burden of its employee's recovery for unseaworthiness was allowed notwithstanding the provisions of §905. This result, however, was justified upon the ground that by its warranty to the shipowner the employer took upon itself not only its own limited obligations to its employee under the Act, but the obligations of the shipowner as well.

In this case, appellant asserts, we do not have the

(1953). Apparently the District Court did not rule on this contention. However, in view of our affirmance of libelant's unseaworthiness claim, we decline to rule either on the District Court's dismissal of the Jones Act claim, or on libelant's argument for a negligence claim in admiralty.

[2] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§901-950 (1964).

[3] 33 U.S.C. §905:

"The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, * * * otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

three-party situation which existed in *Ryan* and in *The Yaka*, where the employer's unseaworthiness responsibility was based upon a duty to indemnify the owner. Here it is asserted if there is such responsibility it runs directly to the employee—a result which §905 expressly forbids.

Appellant misreads *The Yaka*. Its construction of the holding is in accord with the views of the District Court in *The Yaka* but is fairly contrary to the reasoning of the Supreme Court. The Supreme Court did not hold the shipowner liable for unseaworthiness. It expressly stated: "We do not reach that question here" (373 U.S. at 411, footnote 1). It held the charterer, as owner *pro hac vice*, to a warranty of seaworthiness running to its employee. The error on which the Court of Appeals was reversed was "in holding Pan-Atlantic [the employer and charterer] could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury." (373 U.S. at 412). "The only question," the Court stated (at page 412) "is whether the Longshoremen's Act prevents recovery by petitioner for Pan-Atlantic's breach of its warranty of seaworthiness." It rejected the contention (at page 414) "that petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan-Atlantic was not only the owner, *pro hac vice*, of the ship but was also petitioner's employer."

Section 905 was, in clearest terms, held not to bar recovery by an employee for a breach of his employer's warranty of seaworthiness.

The District Court did not err in so holding.

Also assigned as error are holdings of the District Court rejecting appellant's contentions that the vessel on which injury was sustained was at the time a "dead ship"; that appellee was not at the time of injury engaged in seamen's work; that *The Yaka* is distinguishable upon the ground that it dealt with a longshoreman, while appellee was a marine electrician. In none of these do we find merit. The first contention we view essentially as one of fact upon which the court's finding was not clearly erroneous. On the last two contentions we regard *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1953) as controlling.

Judgment affirmed.

MATHES, Senior District Judge, concurring specially:

I concur in the result; but do so only because *Reed* v. *S.S. Yaka*, 373 U.S. 410 (1963), as I understand it, *ex necessitate* reads § 5 out of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. § 905], as applied to the case at bar.